FILED BY CLERK
MAY 30 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JUAN MANUEL REYNOSO, Petitioner.	2 CA-CR 2013-0104-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009151991001DT

Honorable Ronald J. Steinle, Judge

REVIEW GRANTED; RELIEF DENIED

Juan Manuel Reynoso — Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Charged with second-degree murder, petitioner Juan Reynoso was convicted pursuant to a plea agreement of manslaughter, a class two, dangerous felony. The trial court sentenced him to an aggravated prison term of thirteen years. Reynoso filed a pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he argued his plea was invalid as a result of his counsel's ineffectiveness. The trial

court dismissed the petition summarily, a ruling Reynoso challenges in the petition for review now before us. We will not disturb the court's ruling unless it clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Counsel appointed to represent Reynoso in this post-conviction proceeding filed a notice in which he avowed he had reviewed the record and could find no issue to raise. Thereafter, Reynoso filed a pro se petition in which he contended trial counsel's performance had been both deficient and prejudicial under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). He asserted the victim had run him off the road with the victim's truck after an altercation, and he had stabbed the victim in self-defense when the victim began to hit him with a pipe. Reynoso claimed counsel had persuaded him to enter the guilty plea and had told him there was no defense of self-defense in Arizona. Reynoso further alleged that when he entered prison, he learned counsel had "lied to [him]" because A.R.S. § 13-411 establishes a defense of self-defense. And, he added, if counsel had not provided such deficient advice, he would not have entered the plea, but he would have gone to trial and would have been acquitted based on a "duress" defense.

¶3 The trial court denied Reynoso's petition for post-conviction relief "[f]or the reasons set forth in the Response" to the petition. The court added that Reynoso "ha[d] not provided sufficient facts to support a finding that [Reynoso] has shown a colorable claim." Among the state's arguments was that Reynoso had failed to present "any reliable foundation" to support his claims sufficient to require an evidentiary

hearing. As the state pointed out, Reynoso's initial trial attorney[1] had listed self-defense among the defenses that Reynoso might raise in the Notice of Defenses and Request for Rebuttal Witnesses she had filed in September 2009. The state further noted that Reynoso's pro se petition belies his contention that he did not know such a defense existed in Arizona; Reynoso admitted that through initial counsel he had been aware of a possible defense of self-defense, which counsel intended to raise if the case were to go to trial. The state also pointed out that, establishing the factual basis for the plea in Reynoso's presence and with no objection by him, defense counsel stated at the change-of-plea hearing that Reynoso had stabbed the victim "in the chest with a knife," resulting in the victim's death, and that there was "no justification for his act."

¶4 A defendant has the right to the effective assistance of counsel during plea negotiations. *See Lafler v. Cooper*, ___ U.S. ___, ___,____ 132 S. Ct. 1376, 1384, 1387-88 (2012); *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). But to avoid summary dismissal of a petition for post-conviction relief, a defendant must raise a colorable claim that counsel was ineffective with respect to the plea process, requiring an evidentiary hearing. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). A colorable claim is one that, if taken as true, "might have changed the outcome." *Id.* Whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). The claim must have a basis in "reality" and cannot be

[1]Reynoso's first attorney withdrew based on a conflict of interest. It is Reynoso's second attorney whose conduct is the subject of the ineffective-assistance claim.

based on pure conjecture. *Cf. State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984) (proof of counsel's ineffectiveness "must be a demonstrable reality rather than a matter of speculation").

¶5 Given the record before us and the arguments Reynoso has made in his petition for review, we conclude the trial court did not abuse its discretion in implicitly finding Reynoso's claim lacked the appearance of validity. *See State v. Lemieux*, 137 Ariz. 143, 147, 669 P.2d 121, 125 (App. 1983) (defendant must establish claim has appearance of validity in that, if factual allegations were true, he would be entitled to relief). Reynoso's factual allegations are belied by the record, which includes the Notice of Defenses, the transcript of the change-of-plea hearing, and Reynoso's own petition for post-conviction relief.[2] And other than his own affidavit, he provided no other affidavits supporting his claim. *See* Ariz. R. Crim. P. 32.5 (requiring petitioner to attach to petition affidavits supporting factual allegations). Therefore, although trial courts are "obligated to treat [petitioners'] factual allegations as true" in evaluating whether claims are colorable, *State v. Jackson*, 209 Ariz. 13, ¶¶ 2, 6, 97 P.3d 113, 114, 116 (App. 2004), the court is not constrained to do so when, as here, the record belies those factual allegations and the claims, therefore, do not have the appearance of validity, *Lemieux*, 137 Ariz. at 147, 669 P.2d at 125. Moreover, the court readily could have made a threshold

[2]We note, too, that at the sentencing hearing, the victim's youngest sister addressed Reynoso and mentioned the issue of self-defense, apparently having learned at some point that Reynoso's position was he had acted in self-defense. "What kind of person," she said, "so viciously and brutally takes another life and then has the audacity to claim self-defense?" When Reynoso addressed the court and the victim's family, he did not say his conduct had been justified, stating only, "I'm ready to go to prison now for no matter how many years you give me. I did a bad thing. I did a horrible thing."

determination that Reynoso's contention that his lawyer told him there was no defense of self-defense in Arizona was not believable. *Cf. State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 600-01 (1995) (finding no abuse of discretion by trial court in determining no colorable claim raised by third-party affidavits asserting victim recanted).

¶6 Reynoso has not sustained his burden on review of establishing the trial court abused its discretion by dismissing summarily his pro se petition for post-conviction relief. Therefore, although we grant the petition, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge